Emas Kiara Sdn Bhd v Michael Joseph Monteiro (receiver and manager of Lembah Beringin Sdn Bhd) & Ors (Farcoll Estate Sdn Bhd & Ors, interveners)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)-1659–09 OF 2016
BADARIAH SAHAMID, MARY LIM JJCA AND SURAYA OTHMAN J
26 APRIL 2018

Contract — Breach — Allegation of — Whether there was contract concluded — Whether correspondences between parties illustrated conclusion of contract — Whether elements of contract satisfied — Whether there ought to be specific performance of contract

A debenture was created by the third respondent in favour of RHB Bank Bhd from whom the third respondent secured banking facilities. The third respondent defaulted on those facilities causing RHB Bank to appoint the receivers and managers ('the R&M') to sell certain charged properties of almost 1,400 acres by way of a tender exercise ('subject properties'). The appellant submitted an initial tender offer of RM60.8m and this offer was increased to RM83.8m. The first and second interveners ('the interveners') also submitted bids for RM50m which were later increased to RM84m. After these bids were received, the R&M decided to include 13 additional terms and conditions which they wanted the interested bidders to consider. In an email to the appellant, the R&M stated required the appellant to revert 'in writing by 3 October 2011 whether you are agreeable to offer similar terms before our final evaluation on the offers received. Should we not her from you by Monday, your existing offer terms shall remain'. The appellant wrote to the R&M on 3 October 2011 stating, inter alia, that they were agreeable to the terms proposed. The next day, the appellant wrote again to the R&M, clarifying on their earlier letter. The R&M prepared a letter dated 14 October 2011 responding to the two letters but the letter dated 14 October 2011 was never sent. Instead, on 17 October 2011, the R&M wrote a separate letter to the appellant and faxed the same to the appellant on 18 October 2011. Acting on this letter, which the appellant claimed to be an acceptance of their offer, the appellant paid the balance amount making up the deposit. Disagreements, however, arose between the parties and R&M informed the appellant of their decision to cease further negotiations with the appellant. At the High Court, the appellant sued the R&M for breach of contract and claimed for specific performance of the contract. The interveners claimed that they too, were issued with the IM which 'also served as a contract setting out the terms that bind the Interveners throughout the bidding process' upon their expressions of interest.

A The appellant's claim was dismissed by the High Court while the counterclaim was allowed. Hence, the present appeal.

Held, allowing the appeal and dismissing the counterclaim:

B (1) The letters, emails and forms must be read together, and not in isolation. This was where the judge erred, by reading the letters in the manner that he did without taking into account the context and the previous letters etc which had already been exchanged between the parties. The letters were actually not capable of standing or being understood without C reference to the earlier exchanges. More critically, the exchanges must always be read against the IM, the letter(s) of offer made by the appellant and the tender process under which the sale of the subject properties was being conducted by the R&M. When the judge found that the R&M's letter was purporting to accept the appellant's offer of 17 June 2011, that D it was no longer available because the appellant's letters of 3 October 2011 and 4 October 2011 had superseded that letter, that finding and conclusion was plainly erroneous on the law and on the facts (see para 57).

E (2) Contrary to the finding of the judge that there was no offer on the table for the R&M to accept or no offer capable of being accepted, there was one in existence and have expressed our reasons for our conclusions. What the judge seemed to have overlooked was the offer dated 17 June 2011. That offer remained intact and available; and that was what the F R&M accepted. Once again, that offer was an unconditional offer to purchase the subject properties as detailed in the IM. It was an unconditional offer made after the appellant had read and fully understood the contents of the IM; and that the appellant agreed to the stipulated terms and conditions in the IM. The appellant further paid the G required earnest deposit thus showing its genuine intention to be bound by its offer (see para 67).

(3) The appellant's claim was established and the appellant was entitled to relief. However, the nature and type of relief that may be granted was still, H a matter of discretion. The primary relief was for an order of specific performance. Where specific performance could not be granted for any reason whatsoever, damages may be granted. In this appeal, special damages made up of the difference between the market value of the sale properties, unencumbered at the date of filing of the action and the I appellant's offer price; or the loss of use of monies paid to and held by the R&M being interest calculated at the rate of 4%pa on these funds amounting to the sum of RM99,254.79, would be the most appropriate remedy (see para 80).

[Bahasa Malaysia summary

Satu debentur dibuat oleh responden ketiga, memihak kepada RHB Bank Bhd yang daripadanya responden ketiga memperoleh kemudahan perbankan. Responden ketiga memungkiri kemudahan tersebut, menyebabkan RHB Bank melantik R&M untuk menjual beberapa hartanah sebanyak hampir 1,400 ekar dengan cara tender ('hartanah tersebut'). Perayu mengemukakan tawaran tender awal sebanyak RM60.8 juta dan tawaran ini dinaikkan menjadi RM83.8 juta. Pencelah pertama dan kedua ('pencelah-pencelah') juga mengemukakan tawaran sebanyak RM50 juta yang kemudiannya dinaikkan menjadi RM84 juta. Selepas tawaran ini diterima, penerima dan pengurus ('R&M') memutuskan untuk memasukkan 13 terma dan syarat tambahan yang mereka mahu penawar berminat pertimbangkan. Dalam emel kepada perayu, R&M menghendaki perayu untuk memulangkan 'secara bertulis pada 3 Oktober 2011 sama ada anda bersetuju untuk menawarkan terma yang serupa sebelum penilaian akhir kami terhadap tawaran yang diterima. Sekiranya kami tidak mendengar apa-apa daripada anda pada hari Isnin, syarat tawaran anda yang sedia ada akan kekal'. Perayu menulis kepada R&M pada 3 Oktober 2011 menyatakan, antara lain,mereka bersetuju dengan terma yang dicadangkan. Keesokan harinya, perayu menulis semula kepada R&M, membalas surat terdahulu. R&M menyediakan surat bertarikh 14 Oktober 2011 yang membalas kedua-dua surat itu tetapi surat bertarikh 14 Jun 2011 tidak pernah dihantar. Sebaliknya, pada 17 Jun 2011, R&M menulis surat berasingan kepada perayu dan difailkan kepada perayu pada 18 Oktober 2011. Bertindak atas surat ini, yang dinyatakan oleh perayu sebagai tawaran mereka, perayu membayar baki jumlah deposit. Perbalahan, walau bagaimanapun, timbul antara pihak-pihak dan R&M memberitahu perayu tentang keputusan mereka untuk menghentikan rundingan lanjut dengan perayu. Di Mahkamah Tinggi, perayu menyaman R&M kerana melanggar kontrak dan menuntut pelaksanaan spesifik kontrak. Pencelah juga mendakwa bahawa mereka telah diisukan IM yang 'juga berfungsi sebagai kontrak yang menetapkan syarat-syarat yang mengikat pencelah-pencelah sepanjang proses pembidaan' kerana menyatakan minat mereka. Tuntutan perayu ditolak oleh Mahkamah Tinggi sementara tuntutan balas itu dibenarkan. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan dan menolak tuntutan balas:

(1) Surat, emel dan borang hendaklah dibaca bersama-sama, dan bukan secara berasingan. Ini adalah di mana hakim salah, dengan membaca surat-surat dengan cara yang beliau lakukan tanpa mengambil kira konteks dan surat-menyurat terdahulu antara pihak-pihak. Surat-surat tersebut sebenarnya tidak mampu berdiri atau difahami tanpa merujuk pada surat-menyurat sebelum ini. Lebih kritikal lagi, surat-menyurat mestilah dibaca dengan IM, surat tawaran yang dibuat oleh perayu dan proses tender di mana jualan harta benda subjek dijalankan oleh R&M. Apabila hakim mendapati bahawa surat R&M itu berupa penerimaan

tawaran perayu pada 17 Jun 2011, ia tidak lagi wujud kerana surat perayu pada 3 Oktober 2011 dan 4 Oktober 2011 telah menggantikan surat itu, penemuan dan kesimpulan beliau jelas terkhilaf di bawah undang-undang dan fakta (lihat perenggan 57).

(2) Bertentangan dengan dapatan hakim bahawa tidak ada tawaran untuk R&M menerima atau tidak ada tawaran yang boleh diterima, ada satu yang wujud. Apa yang hakim sebenarnya terlepas pandang adalah tawaran bertarikh 17 Jun 2011. Tawaran ini masih utuh dan wujud; dan tawaran inilah yang diterima oleh R&M. Sekali lagi, tawaran tersebut adalah tawaran tanpa syarat untuk membeli hartanah tersebut seperti diperincikan dalam IM. Ia adalah tawaran tanpa syarat yang dibuat selepas perayu membaca dan memahami sepenuhnya kandungan IM; dan perayu bersetuju dengan terma dan syarat yang ditetapkan dalam IM. Perayu selanjutnya membayar wang cengkeram yang diperlukan yang menunjukkan niat tulennya untuk terikat dengan tawarannya (lihat perenggan 67).

(3) Tuntutan perayu dibuktikan dan perayu berhak mendapat relif. Walau bagaimanapun, jenis dan sifat relif yang boleh diberikan masih, hal perkara budi bicara. Relif utama adalah untuk mendapatkan pelaksanaan spesifik. Jika pelaksanaan spesifik tidak dapat diberikan untuk apa jua sebab, ganti rugi boleh diberi. Dalam rayuan ini, ganti rugi khas terbentuk daripada perbezaan antara nilai pasaran harta jualan, tanpa halangan pada tarikh pemfailan tindakan dan harga tawaran perayu; atau kehilangan penggunaan wang yang dibayar kepada dan dipegang oleh R&M sebagai faedah yang dikira pada kadar 4% setahun atas dana ini berjumlah RM99,254.79, akan menjadi remedi yang paling sesuai (lihat perenggan 80).]

Notes

For a case on allegation of breach, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 3491.

Cases referred to

Antonina Marleen Yarendra v Chai Wei Chung [2017] 4 MLJ 359, CA (refd)
Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd [1994] 2 MLJ 754, SC (refd)
Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd [1979] 1 All ER 965, CA (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor [2015] 6 MLJ 310, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Sri Kajang Rock Products Bhd v Mayban Finance Bhd [1992] 1 CLJ 204, CA (refd)

The Queen in the Right of Ontario v Ron Engineering & Construction (Eastern) Ltd [1981] 1 SCR 111, SC (refd)

Legislation referred to

National Land Code ss 327, 329, Forms 24, 49

Appeal from: Civil Suit No 22NCVC–722–06 of 2012 (High Court, Kuala Lumpur)

Robert Lazar (Rabinder Singh, TT Toi and Jolene Loh with him) (Rabinder Budiman & Assoc) for the appellant.
Cecil Abraham (Benjamin Dawson, Koh San Tee, Aniz Ahmad Amirudin, Yeoh Jie Hu and Austen Pereira with him) (Benjamin Dawson) for the respondent.
Gideon Tan (Alfred Lai with him) (Gideon Tan Razali Zaini) for the interveners.

Mary Lim JCA (delivering judgment of the court):

INTRODUCTION

[1] The central issue in the appellant's claim against the first and second respondents, who are the receivers and managers ('R&M') of the third respondent, is whether there is a concluded contract between the parties upon which the appellant can validly launch its claim for the primary relief of specific performance. The appellant answered the poser in the affirmative, relying specifically, on the R&M's letter dated 17 October 2011 sent to the appellant. The respondents, on the other hand, dispute the existence of any concluded contract, arguing that at best, that letter contained their counteroffer.

[2] The appellant sued the respondents for specific performance and various other remedies when the R&M refused to complete the contract of sale. Pending resolution of its claim, the appellant lodged a caveat on the properties which form the subject matter of the contract of sale. The respondents counterclaimed seeking an order that the caveat be lifted and further that damages be assessed for the wrongful lodgment of the caveat.

[3] The eight interveners are parties who also expressed interest in the subject properties; the respondents are said to have sold the subject properties to these interveners. The interveners too, had sued the respondents at the High Court at Shah Alam claiming that the respondents were in breach of contract when the respondents sought to add several new terms after a contract of sale was said to have been concluded between them. That suit was eventually settled where the interveners accepted the new terms. A settlement agreement and eight sale and purchase agreements over the subject properties were entered between the interveners and the respondents. Following this, the suit at Shah Alam was withdrawn.

[4] The appellant's claim was dismissed by the High Court while the counterclaim was allowed. Upon hearing all learned counsel and after due consideration of the appeal record and the grounds for the learned judge's decision, we adjourned for deliberation. This is our decision.

BACKGROUND

[5] A debenture was created by the third respondent in favour of RHB Bank Bhd from whom the third respondent secured banking facilities. The third respondent defaulted on those facilities causing RHB Bank to appoint the R&M to sell certain charged properties of almost 1,400 acres in size by way of a tender exercise ('subject properties'). These subject properties are located in the township of Lembah Beringin and amongst the subject properties are abandoned mixed developments, residential lots, a golf course, an abandoned college and approximately 1,100 acres of estate land.

[6] On 5 May 2011, the R&M advertised in the Star newspapers seeking expressions of interest from the public to purchase the subject properties. The R&M prepared an information memorandum ('IM') that was made available, for a fee, to interested bidders.

[7] Several expressions of interest for the subject properties were received by the close of the period specified for submission of tenders. The appellant was one of them. On 3 June 2016, the appellant submitted an initial tender offer of RM60,080,000. This offer was increased to RM83.8m on 17 June 2011 ('the 17 June 2011 offer'). The first and second intervenors ('the interveners') also expressed interest and submitted their bids for RM50m which were also later increased to RM84m.

[8] After these bids were received, the R&M decided to include '13 additional terms and conditions' which they wanted the interested bidders to consider.

[9] On 28 September 2011, the R&M's representative, one Mr Lim Litt ('DW1') met with the appellant to discuss the 13 additional terms. The R&M followed up on the discussion with an email the next day. In that email, the R&M, inter alia, required the appellant 'to revert in writing by 3 October 2011, 5pm whether you are agreeable to offer similar terms before our final evaluation on the offers received. Should we not hear from you by Monday, your existing offer terms shall remain'.

[10] On 3 October 2011, the appellant wrote to the R&M stating, inter alia, that they were agreeable to the terms proposed. On 4 October 2011, the appellant wrote once again to the R&M clarifying on their earlier letter of

3 October 2011. The R&M prepared a letter dated 14 October 2011 responding to the appellant's two letters dated 3 October 2011 and 4 October 2011. This letter of 14 October 2011 was however, never sent until 18 October 2011.

[11] Instead, on 17 October 2011, the R&M wrote a separate letter to the appellant. This letter was faxed and delivered to the appellant on 18 October 2011. Acting on this letter which the appellant claims to be an acceptance of their offer, the appellant paid the balance amount making up the deposit. After sending its letter of 17 October 2011, the R&M then sent its earlier mentioned letter of 14 October 2011.

[12] The subsequent correspondence exchanged between the parties and their respective solicitors concerned finalising the draft sale and purchase agreements. Disagreements, however, arose between the parties on the terms and conditions which were to be included in the sale and purchase agreements. On 6 December 2011, the R&M informed the appellant of their decision to cease further negotiations with the appellant.

[13] The appellant sued the R&M for breach of contract. It claimed that it is entitled to specific performance of the contract based on the terms and conditions of the appellant's offer on 17 June 2011 read together with the IM and the appellant's letter dated 4 October 2011. The appellant also sought for an injunction restraining the R&M from selling, disposing or otherwise dealing with the sale properties pending disposal of the claim; general damages in addition to or in lieu of specific performance. Where specific performance cannot be granted for any reason whatsoever, the appellant sought special damages made up of the difference between the market value of the sale properties, unencumbered at the date of filing of the action and the appellant's offer price; or the loss of use of monies paid to and held by the R&M being interest calculated at the rate of 4%pa on these funds amounting to the sum of RM99,254.79.

[14] Alongside the above facts, we need to mention what happened to the interveners' expressions of interest and how the R&M dealt with the interveners' offer. The interveners claimed that they too, were issued with the IM which 'also served as a contract setting out the terms that bind the interveners throughout the bidding process' upon their expressions of interest. The interveners claimed that on 13 September 2011, they reached an agreement with the R&M for the subject properties to be sold to the interveners. However, on 19 September 2011, the R&M wanted to add several new terms to the sale. The interveners felt this was unfair and decided to sue the R&M at the High Court, Shah Alam for specific performance of the sale without the new terms. On 20 July 2012, the interveners and the R&M

entered into a settlement agreement coupled with eight sale and purchase agreements of the subject properties. The civil suit was thereafter withdrawn.

THE CENTRAL ISSUE

[15] As was pointed out by the learned judge, the central plank of the appellant's claim was in the legal effect of the R&M's letter of 17 October 2011. It is the principal argument of the R&M that there was no concluded contract upon which the appellant could claim specific performance, let alone, sue. At best, the R&M's letter dated 17 October 2011 was only a counteroffer which was yet to be accepted by the appellant, or a conditional acceptance of the appellant's offer. The R&M's counterclaim is for damages for the wrongful lodgment of the caveat over the subject properties by the appellant.

DECISION OF THE HIGH COURT

[16] A summary of the High Court's findings and decision can be found at para 19 of the learned judge's grounds of decision and it reads as follows:

19. The following paragraphs summarizes the findings of this Court:

(a) there was no agreement reached between the parties as would give rise to a contract that could be made the subject of any claim for specific performance, because:

(i) the 'acceptance' by the R&M in the 17 October 2011 letter was in respect of an offer that had already been superseded by the letter of 4 October 2011;

(ii) this 4 October 2011 letter, which constituted in law a fresh offer from the plaintiff, had not been accepted by the R&M; and

(iii) the 17 October 2011 'acceptance' from the R&M, at best, constituted a counter offer from them;

(b) as a matter of the proper construction of the Information Memorandum, the terms of the Information Memorandum constituted a process contract that governed the manner in which sale and purchase of the subject properties would be carried out;

(c) this process contract did not, however, preclude the defendant from requesting that offers be made on the basis of the 13 additional salient terms set out in the email of 30 September 2011. Accordingly, there was no breach by the defendants of the terms of the process contract as constituted by the Information Memorandum;

(d) even though the word estopped or estoppel was not used in the statement of claim, the material facts upon which the plaintiff sought to establish the operation of the doctrine of estoppel in this case have been sufficiently pleaded, and therefore the plaintiff was entitled to raise estoppel in its claim;

(e) although there was a common underlying assumption — mistakenly held — that there existed a contract for the sale of the subject properties, the plaintiff had not acted in reliance of that assumption in a manner that would be (sic) make it unjust for the Court to permit the defendants to deny the truth of that assumption. Accordingly, estoppel by convention did not apply as against the defendants; and

(f) as a necessary corollary from the dismissal of the plaintiff's claim, the Court found that the caveats entered by the plaintiff over the subject properties had been wrongly entered.

[17] In short, the High Court found that there was no agreement reached between the parties as would give rise to a contract that could be made the subject of any claim for specific performance. The High Court examined the appellant's offer of 17 June 2011, reasoned that this offer was superseded by first, the appellant's own offer of 3 October 2011 and subsequently by another letter dated 4 October 2011. Although the R&M's letter of 17 October 2011 was capable of being an acceptance of the appellant's offer, the learned judge opined that in effect, there was no acceptance as there was no longer any offer from the appellant capable of acceptance.

[18] The learned judge discounted this letter of 17 October 2011 on the basis that it refers to the appellant's letter of offer of 17 June 2011 which the learned judge concluded was no longer in existence. It was the view of the learned judge that the appellant's offer of 17 June 2011 had been superseded by its letters dated 3 October 2011 and 4 October 2011.

[19] Despite having reached the conclusion that there was no contract upon which the appellant could sue, the learned judge went on to consider whether damages may be awarded under the law of a process contract or 'the Contract A' argument, where the decision of *The Queen in the Right of Ontario v Ron Engineering & Construction (Eastern) Ltd* [1981] 1 SCR 111 is relevant. Briefly, a process contract concerns the manner in which the tender is to be carried out; that there is an implied obligation on those who put out or invite tenders to only accept conforming tenders; and that there is a duty of good faith. The principle evolved to protect the integrity of the bidding process in tender exercises. The learned judge found that 'as a matter of construction of the effect of the information memorandum, a process contract had come into existence between the receivers and managers on the one hand and each of the offerors on the other'.

[20] Having expressed his understanding of the law of process contract and that the arrangements were capable of finding the existence of a process contract, the learned judge found that there was no breach of the terms of the IM when the R&M introduced new terms that were not already in the IM.

A However, the issue did not proceed further as the learned judge found that it was not the appellant's pleaded case that there had been any breach of any duty of good faith or fair dealing on the part of the R&M — see para 54 of the grounds of judgment.

B FINDINGS AND DETERMINATION OF THIS COURT

[21] This appeal turns on the same issue that was before the High Court, that is, whether the R&M was in breach of contract for failing to complete the contract to sell the subject properties, as agreed.

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[22] We appreciate that the learned judge had taken pains to deal with the appellant's claim from the perspective of a process contract, and this was after concluding that there was no contract under the principal arrangement. Having examined the pleadings and having clarified with learned counsel for D the appellant, it is clear that the appellant's claim is not grounded on a process contract concerning the tender exercise and existing alongside the primary contract. It is based entirely on the claim that there is a concluded contract for the sale and purchase of the subject properties. Consequently, we will make no E deliberations on this; more so when it is not pursued by the appellant in this appeal before us. We will confine ourselves to the issue of whether there was a concluded contract to warrant the reliefs sought.

[23] Returning then to the appellant's claim for breach of contract, the court F must first be satisfied that there is a concluded contract. The learned judge decided that there was none. This court will not exercise its powers of appellate intervention unless satisfied that this decision is plainly erroneous; that such error is perverse or unwarranted in the totality of the facts presented at trial; and/or that the consideration of the issues was not in accordance with the G relevant applicable principles of law. There is a long line of consistent authority to this effect and we can do no better than to cite the Federal Court's decision in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441.

[24] Learned counsel for the appellant argued that the appellate intervention H is warranted because the learned High Court judge failed to look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms. If the parties have agreed, then there is a contract even if one or both parties had reservations not expressed in the correspondence. The general approach of the court is to lean in favour of upholding bargains I and not in striking them down willy-nilly — per Gopal Sri Ram JCA in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327.

[25] Learned counsel for the appellant further argued that instead of following this well-tested approach, the learned High Court judge examined

the exchange of letters or correspondence between the parties, treating each as an incident in itself without paying sufficient regard to the tenor of the preceding correspondence. The learned High Court judge did not apply the objective test as is required under the law.

[26] Learned counsel for the R&M invited the court to take a broader approach when construing the terms of the 17 October 2011 letter; which is, to ask, looking at the entire circumstances of the case, what were the set of terms which the parties intended to contract with each other. This broader approach was advocated in the case of *Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd* [1979] 1 All ER 965, an approach since adopted by the Federal Court in *Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310.

[27] In *Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor,* the Federal Court reasoned that the question of whether the parties had reached *consensus ad idem* on the terms 'could only be gleaned from the mandate letter, the emails/letters and conduct of the parties'. Whether the parties have reached agreement on the material terms depends 'not on the subjective mind, but upon a consideration of what was communicated between them by words or conduct ... from the perspective of the notional reasonable man'. In other words, the test is an objective one.

[28] This broader approach was in fact applied in an earlier Supreme Court decision in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd* [1994] 2 MLJ 754 although in that case, it was referred to as the 'reasonable man' test. Edgar Joseph Jr SCJ opined that in determining whether an agreement existed:

> The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract. In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test, more particularly, it will ask itself, what would the intention of reasonable man be, if they were in the shoes of the parties to the alleged contract.

[29] At this point, it may be appropriate for us to address the submissions of the interveners. Aside from associating themselves with the R&M's submissions that there was no concluded contract, that the letter of 17 October 2011 constituted a conditional instead of an unequivocal acceptance, and that the appellant has no valid right over the subject properties, the interveners questioned the appellant's motive in filing the claim. The interveners made two contentions.

A **[30]** First, the interveners argued that the appellant ought to have intervened in their suit at Shah Alam. Second, the appellant only filed after the interveners had sued, suggesting that the appellant knew that it had no valid interest over the subject properties, that the suit is 'only tactic ... to wear the interveners down by filing legal suits knowing that the interveners has paid RM84m to RHB Bank for the subject properties and make the interveners come to some sort of a settlement which would benefit the appellant'. The interveners further suggested that the suit is 'merely an act of the appellant to delay the interveners the fruit of its investment hoping that the interveners would go soft and share its benefit from the subject properties with the appellant'.

[31] We say, with respect, we cannot agree with these submissions of the interveners on the matter of motive, especially where there is no issue inter se between the appellant and the interveners. There is no basis or evidence to support that line of submission. Therefore, we shall deal only with the issue of whether there is a valid subsisting contract between the appellant and the R&M over the sale of the subject properties as first held out in the IM, an issue which is determinative of the claim between the appellant and the R&M.

[32] On that issue, we take all the submissions on board; that the court must apply an objective test when scrutinising all the evidence led and presented before the court in order to determine the issue of whether there is *consensus ad idem* for concluding that a contract exists. In the event there is such a contract formed, the court should strive to uphold the bargain reached between the parties.

[33] It was the specific finding of the learned judge that there could not be any acceptance in the R&M's letter of 17 October 2011 because the 'offer from the plaintiff ... was no longer in existence'. In the learned judge's understanding, although there was no reference in the R&M's letter of 17 October 2011 as to which offer the R&M was referring to, the learned judge concluded that the R&M was referring to the appellant's offer as found in 'the 3 or 4 October correspondence', and that the offer of 3 October 2011 was not capable of being accepted as it had been 'superseded by the time their acceptance was communicated'. From the grounds of judgment, it would appear that even the appellant's offer of 17 June 2011 had been superseded.

[34] With respect, such reading is plainly erroneous and not borne out by the facts and certainly, not from an objective evaluation of all the facts.

[35] We agree with the submissions of the appellant that the learned judge has failed to properly apply the objective test to the material facts in this case. While the learned judge may have examined the information memorandum, the correspondence exchanged between the parties culminating in the R&M's

letter of 17 October 2011 as well as the conduct of the parties following that letter including the subsequent correspondence between them in order to determine whether there was a concluded contract, the learned judge erred in considering each of these in isolation, and without proper or due regard to the context in which these documents were made and exchanged. These material facts provide relevant context against which the legal principles for ascertaining the existence of any legal relationship are to be objectively evaluated.

[36] As far as the facts are concerned, the learned judge was obliged to take into regard the whole exercise of selling or disposing of the subject properties. In order to determine that crucial question of existence of contract, the learned judge was obliged to consider the totality of evidence in the form of oral and/or written exchanges between the parties, having careful regard to the context in which those exchanges were made. Until and unless there is express rejection or a necessary inference of rejection of the appellant's offer or even participation in the tender exercise by the R&M, we are of the respectful view that it was not open to the learned judge to construe the letters and events as superseding each other, one overtaking the other.

[37] Starting then with two material events, the advertisement in the Star inviting expressions of interest; and the preparation of the information memorandum ('IM'). The IM was available at a fee.

[38] The whole object of the exercise and the IM is to secure a buyer for the subject properties; obviously it must be at the best terms for the R&M so that the debenture comes through for the lender bank. The exercise however, is a process which takes time in view of the size and value of the subject properties.

[39] While the IM is not itself a contractual document and that it does not constitute an offer or even an invitation to treat, the information or contents found in the IM are by no means trivial, irrelevant or even inconsequential. On the contrary, there are peppered throughout the IM, invocations of its importance and significance. See for instance, cll 1.2, 1.3, 1.6, 1.7, 1.8, 2.2, 2.13, 7.0, 8.3 and 8.8. The IM contains material and relevant information about for instance, the intention of the R&M, the subject properties, important indications as to how the expressions of interest, offers and negotiations will be conducted and the related timelines and formats to be used, the powers and rights of the R&M and of the interested parties/persons, conditions of sale. It is not an inconsequential document; it forms the bulwark of what is to come, it forms the basis of the process contract. Even the interveners make this point in their submissions.

[40] The IM invites those interested to make an offer or a bid for the purchase of the subject properties on an 'as is where is' and 'en bloc' basis.

Anyone interested is expected to have conducted their own due diligence on the subject properties prior to submitting their offer. In fact, 'interested parties are advised to consult and seek professional independent advice before taking action'.

[41] At cl 1.6, the R&M have expressly warned that the R&M 'reserve the right not to accept the highest or any of the offers submitted. The R&M also reserve the right to negotiate with any party or parties to improve their offers or terms of their offers. The R&M are under no obligation or circumstances to disclose to any party or parties the details of the offers received'. At cl 1.7, it is further stated:

> *The acceptance and timing of acceptance of any offer would be at the Receivers and Managers' sole discretion.* (Emphasis added.)

[42] Details of all the subject properties are given at cl 4.3; and this extends to information on the status of progress of development works on the subject properties, existing agreements with third parties — see cll 4.7–6. At cl 7.0, there is a clear condition of sale which any purchaser interested must have regard to, that is:

> The sale of the properties is subject to the following salient terms and conditions which shall be incorporated in the sale and purchase agreement.

[43] A considerable number of terms and conditions are spelt out in the IM. Amongst them are the following:

(a) the sale is on an 'as is where is' and 'en bloc' basis;

(b) offer must be to purchase the subject properties as a whole;

(c) R&M deemed fully and irrevocably released and discharged once they have fully received the purchase consideration;

(d) cost or expense resulting or incidental to the transfer of the subject properties is to be borne solely by the purchaser;

(e) subject properties sold free from encumbrances; and

(f) subject to the absolute discretion of the R&M, payment of earnest deposit of 5% of the offer price, provision of capability statement or company profile including Forms 24 and 49 of offeror; balance purchase price to be paid within three months from the date of the SPA or date of relevant approvals, whichever is later, or any such extension of time granted by the R&M but in any event not later than 30 November 2011.

[44] Moving along, there is also cl 8. Anyone interested in participating in the sale is required to make an offer together with earnest deposit in the form of a cashier's order/bankers draft of 5% of the offer price. Clause 8 requires all offers to be submitted not just in writing but to be in the offer form that is prescribed in the IM. Once an offer form has been duly completed, it has to be sent to the R&M in properly marked and sealed envelopes. The closing date for an offer is by 5pm on 3 June 2011. This dateline was subsequently extended by the R&M. At cl 8.4, it is indicated that a formal SPA incorporating the terms and conditions of sale stipulated in the IM must be drawn up.

[45] From the above, it is quite clear that contrary to the submissions of the R&M, while the IM is neither an invitation to treat or an offer such that agreement to the terms and conditions found in the IM may not signify the formation of a contract, those terms and conditions and thereby the IM, are not insignificant terms and conditions. We observed that the learned judge had familiarised and reminded himself of the above terms. In fact, the learned judge was prepared to conclude that 'as a matter of the proper construction of the information memorandum, the terms of the information memorandum constituted a process contract that governed the manner in which sale and purchase of the subject properties would be carried out'. Even the interveners make the same argument about the IM.

[46] Having ourselves examined those terms and the IM, we can appreciate why the learned High Court judge viewed the terms and conditions set out in the IM as minimum terms. At the very least, these terms must be agreed to before anyone makes a bid as these terms will form part of the SPA which is to be later drawn up and signed between the parties. The terms may be improved on but they cannot be diminished and this is evident from cl 7.13 which provides that the 'terms and conditions of sale stipulated in this IM are non-negotiable and *shall* be incorporated in the sale and purchase agreement'. This clearly expresses the eminent importance of the 13 terms and conditions in cl 7, that these terms and conditions must be agreed to and later incorporated in the eventual SPA. This is significant as this will impact on the determination of the issue as to whether a concluded contract has been reached in the particular circumstances of the case; and whether the additional or new terms were in fact additional or new.

[47] The IM thus provides important and relevant contextual background against which the exchanges between the parties must now be objectively examined in order to determine whether a contract has been concluded. There must be evidence to establish that both parties had the intention to create legal relations, that there was *consensus ad idem* or agreement between the parties and, there must be consideration. Once these three elements present, there is a valid contract enforceable in law — see *Sri Kajang Rock Products Bhd v Mayban*

Finance Bhd [1992] 1 CLJ 204.

[48] When examining the correspondence exchanged, we necessarily have to start with the R&M's letter of 17 October 2011 upon which the appellant pivot their case, working backwards to the various letters that are referred therein. The letters from the R&M are signed by Lim Titt and Narimah Mohd Perai (or on her behalf). We are taking the liberty of setting out these letters for easy reading and understanding.

[49] In the R&M's letter dated 17 October 2011, the R&M states:

LEMBAH BERINGIN SON BHD (Company No 243726–P)

(Receivers and Managers Appointed) (In Liquidation) ('the Company') Letter of offer

We refer to your offer submitted on 17 June 2011, our Mr Lim Litt's email dated 30 September 2011 and the meeting between your representative and our Mr Lim Litt on 28 September 2011 with regards to the above matter.

Having completed our evaluation, we are pleased to inform that the Receivers and Managers (R&M) are *agreeable to accept your offer to purchase* the Company's properties (Lands) in the Information Memorandum dated 5 May 2011 (IM) for RM83.8 million, *subject to the amongst others, as agreed, the salient conditions stated herein below*:

(a) The sale is on an 'as is where is' and 'en bloc' basis, whereby the Purchaser shall be deemed to have made its own inquiries and investigations on the properties available for sale.

(b) The Purchaser is required to execute the Sale and Purchase Agreement (SPA) to purchase the Company's properties within seven (7) days from the date of this letter of offer, failing which the initial deposit of 5% will be forfeited.

(c) The Purchaser is agreeable to the settlement of the Purchase Price as follows:

(i) 10% deposit upon signing of the SPA;

(ii) 40% within fourteen (14) days from the signing of the SPA;

(iii) Balance 50% within thirty (30) days from the signing of the SPA. No extension of time will be granted for the settlement of the Purchase Price.

(d) Deposit will be forfeited in the event that either 40% of Balance Purchase Price not made within 14 days from SPA or 50% of Balance Purchase Price not made within 30 days from date of SPA.

In addition we enclose herewith the draft SPA for your comments.

In view that time is of essence, we hope to receive any comments from your solicitor on the SPA soonest. For the record, we have appointed Messrs ... to represent us for the SPA. The contact details are as follows: ...

...

Contact Person: Tan ...

Please note that in the event you fail to execute the SPA within the stipulated period, we shall forfeit your 5% earnest deposit and you shall have no recourse against the R&M for any damages as a result of the default, as highlighted under our IM dated 5th May 2011.

Should you require any further clarification on the above, please do not hesitate to contract Mr Lim Litt or Ms Anoopal Kaur at this office.

Yours faithfully

For and on behalf of

Heng Ji Keng and Michael Joseph Monteiro

Receivers and Managers

Lembah Beringin Sdn Bhd

(Emphasis added.)

[50] This letter from the R&M makes reference to a letter from the appellant, an email sent by the R&M and a meeting between the parties; and all three must be examined. First, the appellant's letter of offer of 17 June 2011 submitted to the R&M. In the letter of 17 June 2011, the appellant states:

RE: Expression of Interest for the Company's Properties in Lembah Beringin

Further to your letters dated 8 June 2011 and 13 June 2011 we are pleased to enclose herewith our additional earnest deposit via HSBC Bank draft no 874696 for RM1,150,000 (Ringgit Malaysia One Million One Hundred Fifty Thousand Only)

Thus, our offer is RM83,800,000 (Ringgit Malaysia Eighty Three Million Eight Hundred Thousand only).

Should we be successful in our bid, we wish to state that we shall incorporate a special purpose vehicle as a development company to complete the transaction.

We are also pleased to inform that our bid is in joint consortium comprising of Pan Sarawak Holdings Sdn Bhd, major shareholder of public listed Pansar Bhd and Mandat Wawasan Sdn Bhd. The shareholder of Mandat Wawasan Sdn Bhd is a major shareholder of public listed Priceworth International Bhd.

[51] Together with this letter, the appellant sent a duly completed offer form in the format prepared by the R&M — see p 65 of the common core bundle of documents ('CCBD'). This is actually the second form completed by the appellant.

[52] The R&M's email dated 30 September 2011 which was sent by Mr Lim (p 79 CCBD) and which refers to the meeting between the parties reads as follows:

Dear Lim Yew Hoe/Joseph Chong

We refer to the meeting held at our office on 28 September 2011.

Kindly find the attached salient terms that we will be considering from offerors for your perusal, that was also furnished to you in the meeting that day.

As discussed, we would appreciate it you can revert in writing by 3 October 2011, 5pm whether you are agreeable to offer similar terms before our final evaluation on the offers received. Should we not hear from you by Monday, your existing offer terms shall remain.

In addition, as our titles search are not updated, we shall leave it to the offerors to conduct their own searchers accordingly.

Should you have any queries, please do not hesitate to contact us.

Regards

Lim Litt

[53] Three other letters exchanged between the parties merit mention, and these are the R&M's earlier letters dated 8 June 2011 and 13 June 2011, as well as the appellant's letter dated 3 June 2011. The R&M's letter dated 8 June 2011 can be found at p 59 of the CCBD and it reads as follows:

LEMBAH BERINGIN SON BHD (Company No 243726–P)

(Receivers and Managers Appointed) (In Liquidation) ('the Company')

Expressions of Interest for the Company's Properties in Lembah Beringin

Invitation to participate in a Closed Tender

We refer to your offer dated 3 June 2011 regarding the above matter.

Thank you for the offer of RM60.08 million for the Properties as per our Information Memorandum dated 5 May 2011.

The offers received for the Properties to date have been very competitive. As such, the deliberation has been difficult given that the Receivers and Managers are obliged to procure the highest offer possible in the interest of the Company's stakeholders. In this regard, and as we feel that there is still some potential value for the Properties, we are inviting your goodself to consider increasing your offer price.

Please revert with your revised offer by completing the Offer Form enclosed to be accompanied by the additional earnest deposit in the form of a cashier's order/banker's draft equivalent to *5% of the increase in offer price* made payable to *'Lembah Beringin Sdn Bhd (Receivers and Managers Appointed)'* and to return the same to us in a sealed envelope marked *'LR 4458-Closed Tender'* on the top left hand corner of the envelope *no later than 5pm, 14 June 2011 (Tuesday).* Kindly also provide us with evidence of your financial capabilities (eg bank guarantee, bank statements, or support letter from bank) to facilitate our evaluation.

The earnest deposit will be refunded free of interest in the event your offer is not successful.

In the event that we do not receive your revised offer, we shall deem that your offer remains unchanged.

We look forward to receiving a positive reply from you. A

Please contact either Ms Yvonne Liew or Ms Anoopal Kaur at this office if you have any questions on the above matter.

[54] The R&M's other letter of 13 June 2011 can be found at p 62 of the CCBD and it states: B

LEMBAH BERINGIN SON BHD (Company No 243726–P)

(Receivers and Managers Appointed) (In Liquidation) ('the Company') Expressions of Interest for the Company's Properties in Lembah Beringin

We refer to your offer dated 3 June 2011 and our letter dated 8 June 2011 regarding the above matter. C

We wish to inform that the acceptance of any offer is subject to *ALL* the salient terms and conditions ('T&C') stipulated in the Information Memorandum ('IM') dated 5 May 2011 being complied with. D

Any additional T&C that you have proposed that contravenes to the T&C in the IM MAY disqualify you from participating in the sale and accordingly your offer may not be considered.

Meanwhile, we are granting you an extension of time until 5 pm, 17 June 2011 (Friday) to submit your revised offer, if any. E

Should you have any queries, please do not hesitate to contact Ms. Yvonne Liew or Ms Anoopal Kaur of this office.

[55] The appellant's letter dated 3 June 2011 is found at p 56 of the CCBD and it reads: F

Re: Bid for Lembah Beringin

We refer to the meeting between your Miss Anoopal Kaur, our Roger Wong, Mr YH Lim and Mr Paul Ong today. G

As discussed and agreed we write to confirm that our offer is subject to the following terms and conditions:—

(a) The sub division for the property being completed per our requirements and our balance purchase price is payable only on delivery of the sub divided titles with the completion of the sale and purchase agreement which will be beyond the THREE months from signing. H

(b) that we may nominate different companies from EKB Group of companies to acquire separate lots of the properties.

(c) The golf course will also be delivered free from encumbrance including the operators. I

Based on the aforesaid conditions we enclose our HSBC BANK DRAFT NO 764983 being the requisite deposit.

[56] Sent together with the above letter is the offer form prepared by the R&M which has been completed by the appellant — see p 58 of the CCBD. This was the first offer form that was completed by the appellant, the second offer form was referred to earlier when we set out the appellant's subsequent letter dated 17 June 2011 expressing interest in the subject properties (see pp 63–65 of CCBD).

[57] We agree with the appellant that all these letters, emails and forms must be read together, and not in isolation. It is not possible to do so given the circumstances and the contents of the letters themselves. This is where the learned judge erred, by reading the letters in the manner that he did without taking into account the context and the previous letters etc which had already been exchanged between the parties. The letters are actually not capable of standing or being understood without reference to the earlier exchanges. All the letters must be read together. More critically, the exchanges must always be read against the IM, the letter(s) of offer made by the appellant and the tender process under which the sale of the subject properties was being conducted by the R&M. So, when the learned judge found that the R&M's letter was purporting to accept the appellant's offer of 17 June 2011, that it was no longer available because the appellant's letters of 3 October 2011 and 4 October 2011 had superseded that letter, that finding and conclusion is plainly erroneous on the law and on the facts.

[58] The R&M's letter of 17 October 2011 itself refers to the appellant's letter of offer dated 17 June 2011, an email sent by the R&M and a meeting between the parties. As we know, without an offer and in this case, this particular offer of 17 June 2011, there would be nothing for the R&M to consider. It is the appellant's letter of offer, completed in accordance with the strict requirements and directions in the IM, which forms the underlying bedrock of any contract between the parties. Using the form prescribed, the appellant had made its first offer of RM60m but this offer was subject to the appellant's letter and the conditions stated in its letter of 3 June 2011 — see p 58 of the CCBD. In the R&M's letter of 13 June 2011, the R&M reminded the appellant that 'any acceptance of any offer is subject to ALL the salient terms and conditions ('T&C') stipulated in the information memorandum ...'; and that any additional terms and conditions proposed by the appellant which contravene the T&C in the IM 'MAY disqualify' the appellant from participating in the sale and that the appellant's offer may not be considered.

[59] It is further apparent from the above correspondence that the appellant's offer was never rejected or disqualified, whether one is looking at the first offer of 3 June 2011 or the revised offer of 17 June 2011. This signifies, at the very minimum, that the appellant's offer did not contravene the essential terms and conditions of the IM. An offer which was not based on the IM or which did not

accord with the strict formalities and requirements of the IM will not be a valid offer at all. This would be in keeping with the terms of cl 8 of the IM as discussed earlier. Until retracted (even then it has to be in accordance with the terms in the IM) or unless it is rejected or disqualified by the R&M, the appellant's offer of 17 June 2011 remains valid and available for acceptance by the R&M.

[60] Contrary to the learned judge's findings and the manner in which he set about considering the evidence, each of the letters, read chronologically and sequentially, reveal that each of the letters relate to each other and more materially, must be read with the appellant's letter of offer dated 17 June 2011. Without the appellant's letter of offer, there would be no offer, prepared on the format required under the IM, for the R&M to even begin to consider.

[61] In our further view, the answer to the central question of whether there is a concluded contract in existence must be in the affirmative due to the presence of the 'three Cs' required for the formation of contract.

[62] First, there is certainty of subject matter — the subject properties etc are well identified in the IM. There is also certainty in who the contracting parties are — the third respondent represented by the respondents who are the R&M appointed by the debenture holder RHB Bank pursuant to a debenture; and the appellant who expressed interest in buying the subject properties as identified in the IM. There is also consideration in the price offered by the appellant — RM83.8m to which earnest deposit has been duly paid, followed by the payment of the 10% deposit. Finally, from the documents exchanged between the parties and the actions taken by them; there is *consensus ad idem.* It is evident that both parties had every intention to create a legal relationship with the R&M evidencing its intention in the letter under scrutiny.

[63] Insofar as this third 'C' is concerned, there is the clear and distinct acceptance by the R&M by the use of the term 'accept'. By this letter of 17 October 2011, the R&M had every intention to accept the appellant's offer of 17 June 2011. In fact, from the contents of the letter read against the backdrop of the earlier letters and meetings, this letter serves to confirm an even earlier agreement between the parties and it is the R&M reminding the appellant of its own agreement and of the salient conditions.

[64] The use of the term 'agreeable' does not qualify the acceptance nor does it render the acceptance any less an acceptance. On the contrary, it emphasises and evinces clear intention to agree and to accept the appellant's offer. Generally, in the reading and construction of commercial documents, one should not be tearing into or subjecting such commercial documents to school exercises in grammar, syntax or sentence construction. Suffice to say that the

R&M's letter is plain in its intent of message — that the R&M accepts the appellant's offer. The R&M are professionals engaged in conducting the whole exercise of sale with the ultimate aim of finding a buyer and concluding a contract of sale with such a buyer. It would be reasonable and it certainly makes good commercial sense that the R&M would have exercised care and caution in their role and in their communication with third parties such as the appellant and the intervenors. The use of such terms as 'agreeable' and 'accept' are unequivocal terms. They convey what they mean, an acceptance of the appellant's offer.

[65] The opening terms in the second paragraph of the letter of 17 October 2011 also makes it quite clear in unequivocal terms and language that the letter is written upon completion of evaluation of tender bids, in particular, after the R&M had evaluated the appellant's offer:

> *Having completed our evaluation, we are pleased to inform* that the Receivers and Managers ('R&M') *are agreeable to accept your offer to purchase* the Company's properties ('Lands') in the Information Memorandum dated 5th May 2011 ('IM') for RM83.8 million, subject to the amongst others, as agreed, the salient conditions stated herein below: ... (Emphasis added.)

[66] We note that the learned judge was prepared to hold that the R&M's letter of 17 October 2011 was capable of being an acceptance but he could not conclude that there was a contract because according to His Lordship, 'there was no acceptance as there was no longer any offer from the appellant capable of acceptance'.

[67] With respect, that is not the case. Contrary to the finding of the learned judge that there was no offer on the table for the R&M to accept or no offer capable of being accepted, we have already found that there was one in existence and have expressed our reasons for our conclusions. What the learned judge seems to have overlooked is the offer dated 17 June 2011 (p 767 of the record of appeal). That offer remains intact and available; and that is what the R&M accepted. Once again, that offer is an unconditional offer to purchase the subject properties as detailed in the IM. It is an unconditional offer made after the appellant had read and fully understood the contents of the IM; and that the appellant has agreed to the stipulated terms and conditions in the IM. The appellant has further paid the required earnest deposit thus showing its genuine intention to be bound by its offer.

[68] The learned judge was erroneous in holding that there could not be an acceptance of the appellant's offer of 17 June 2011 since that offer had been superseded by the terms of the appellant's letter of 3 October 2011. With respect, that is erroneous, especially when those letters are examined. Having scrutinized them, whether it be the letter of 3 October 2011 or 4 October

2011, neither of these letters are offers but are instead, correspondence clarifying the position of the appellant's offer which remains in the offer dated 17 June 2011. We further found these letters deal with the complaint that the appellant had over the R&M's delay in their decision on the bid. The fact that the R&M did not send this other letter of 17 October 2011 immediately upon being written, but send it after the earlier letter of 17 October 2011 expressing acceptance of the appellant's offer further corroborates our findings and conclusions.

[69] We cannot agree with the learned judge's conclusions that the R&M's letter 'at best constituted a counter-offer'. We agree with the appellant's argument that for the terms in this critical letter to constitute a counteroffer, especially in view of the circumstances and the existence of other bids, there must be a time frame within which the appellant's response is expected. The R&M had consistently stipulated time periods in its previous letters and fall back positions indicating thus, the finality and conclusiveness of its current decision of acceptance.

[70] The R&M's letter of 6 December 2011 further supports all the above construction. In this letter of 6 December 2011, the R&M themselves construed their letter of 17 October 2011 as an acceptance. There can be no clearer evidence than that from the R&M themselves.

[71] This acceptance by the R&M is also consistent with the terms and conditions of the IM, in particular:

(a) cl 1.6 where the R&M is not obliged to accept the highest or any of the offers submitted;

(b) cl 1.7 where the acceptance and timing of acceptance of any offer would be at the R&M's sole discretion;

(c) cl 2.2 where 'upon acceptance of the successful offers by the R&M', 'the terms and conditions stipulated in this IM in respect of the sale of the properties, the signing the sale and purchase agreement and timing thereof, and the earnest deposit shall constitute a binding contract between the company and the successful offerors';

(d) cl 2.13 where it is inter alia provided that it 'is within the sole discretion of the receivers and managers to select persons and/or entities which may participate in this expression of interest exercise described herein, including the acceptance of any offer'; and

(e) cl 8.3 provides that 'successful offerors will be notified in writing upon acceptance of the offer received by the receivers and managers'.

[72] In any case, we agree with the appellant's submissions that the 13

A additional terms that the R&M sought to subsequently insert were not salient terms as they were not even stipulated in this letter. What were salient terms were those terms found in the IM and that cl 2.2 are met. The four conditions in this letter are consistent with those found in the IM. In this respect, there is agreement on the three primary matters: (1) terms and conditions as found in the IM; (2) signing of a formal SPA and the timing thereof; and (3) agreement to pay earnest deposit; and such agreement is adequate for the formation of contract.

C **[73]** The above conclusions is consistent with what is pleaded. At para 10 of the statement of claim, the plaintiff pleads that following the R&M's request that the appellant consider increasing its offer price, the appellant did precisely that. Vide letter dated 17 June 2011, the appellant responded to the R&M's request, revised its offer from RM60m to RM83.3m and return a duly completed prescribed form together with an additional sum of RM1.15m as the additional earnest deposit sum — see p 65 of CCBD.

[74] From June to mid July 2011, the parties were in contact with one another, either meeting or through telephone conversations, with the R&M seeking confirmation of the appellant's ability to complete the sale, including whether the appellant was prepared to sign the SPA within 30 days, if required to do so. The IM provided for a three month time lapse for the signing of the SPA.

F **[75]** Thereafter, the R&M went quiet. In early August, the appellant wrote to the R&M for early confirmation of the R&M's acceptance of its offer. In response, the R&M advised that it would revert with the appellant's offer once it received a reply from the debenture holder. The appellant then decided to check with the debenture holder who answered in the negative.

[76] The parties then met to discuss additional terms that the R&M wanted inserted. It would appear from the R&M's letter of 17 October 2011 and the appellant's letter of 3 October 2011 that the appellant was agreeable to these additional terms. This acceptance is not remarked upon in the R&M's letter of 17 October 011, in particular, it was not disputed or denied.

[77] The conduct of the parties following that confirmed the existence of a contract. The fact that the parties continue to negotiate after they appear to have agreed to the same terms does not mean that there is no agreement reached. Disputing over the terms to be included in the SPA is also no reason to say that there was no contract. We further find that contrary to the learned judge's alternative findings that the R&M's letter of 17 October 2011 was at best, a counteroffer, also erroneous. The additional or new terms are not salient or material as these terms do not amount to essential terms or essential terms

that the appellant has not already agreed to. The entire course of negotiations must be considered in order to decide whether an apparently unqualified acceptance did in fact conclude the agreement. As expressed in in *Charles Grenier Sdn Bhd v Lau Wing Hong:*

> ... the case may then belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or implied, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
>
> In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document, and in the second case as a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

[78] We agree with learned counsel for the appellant that there is a concluded contract and that an agreement has come into place. The parties were subsequently working out the finer details for inclusion in the SPA. The fact that they failed to agree on these details does not mean that there was no agreement reached. The dispute was over the conveyancing details which though essential were not the material terms that must be settled before an agreement may be said to have come into existence.

[79] Furthermore, the appellant paid the balance amount to make up the 10% of the offer price; this formed the deposit. This sum was accepted by the R&M. This payment of RM3.8m represents 10% of the purchase consideration for the sale of the properties is clearly agreed between the parties.

[80] Consequently, the appellant's claim is established and the appellant is entitled to relief. However, the nature and type of relief that may be granted is still, a matter of discretion. The primary relief is for an order of specific performance. Where specific performance cannot be granted for any reason whatsoever, damages may be granted. In this appeal, special damages made up of the difference between the market value of the sale properties, unencumbered at the date of filing of the action and the appellant's offer price; or the loss of use of monies paid to and held by the R&M being interest calculated at the rate of 4%pa on these funds amounting to the sum of RM99,254.79, would be the most appropriate remedy.

[81] In view of the presence of the intervenors and what has since transpired between the interveners and the R&M over the subject properties, we are of the view that the appropriate remedy is an award of damages of RM99,254.79 as claimed by the appellant.

[82] The last issue concerns the counterclaim of the respondent which was allowed. The counterclaim relates to the alleged wrongful entry of caveat. It is the submission of the appellant that the learned judge erred in not determining whether the entry of caveat was wrongful in the first place; that the removal of caveat does not automatically mean that an order to pay compensation follows automatically.

[83] A removal of caveat was ordered in this case following the learned judge's conclusions that there is no concluded contract between the appellant with the R&M. The order to pay compensation still requires an examination of whether the entry of caveat was without reasonable cause and whether there is proof of loss or damage suffered. In the recent decision of *Antonina Marleen Yarendra v Chai Wei Chung* [2017] 4 MLJ 359, this court held:

> [14] Again, such payment of compensation is only where the person has suffered damage or loss by virtue of such caveat — 'pay compensation to any person or body *who thereby suffers* any damage or loss'. (Emphasis added.) This clearly means that before the order for compensation may be made, the court must be satisfied that damage or loss by reason of the caveat has been established on the facts and in law. These terms in s 329(1) are not surplusage but are instead the conditions which must be met before compensation may be ordered.
>
> [15] The respondent, as the aggrieved party bears the burden of proving liability to pay compensation. The court must be satisfied, on a balance of probabilities that liability is attached on the particular facts and circumstances. To suggest that s 329(1) is mandatory in that the court must necessarily order compensation upon a removal of a caveat under s 327 is to read into s 329 words and intention that are just not there. Section 329(1) provides for a liability to pay; it does not provide that the appellant shall pay compensation for the wrongful entry of the caveat.
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> [16] Some guidance may be obtained from a steady line of decisions pronouncing the effect of similar provisions under criminal law; that upon proof a particular charge, the terms 'shall be liable to' are not mandatory in effect and purpose. Such terms leave the court with entire absolute discretion as to the suitable punishment which the court wishes to mete out in the particular facts, taking into account any mitigating circumstances which may be present. In *Public Prosecutor v Man bin Ismail* [1939] 1 MLJ 207; [1938] 1 MLRH 241, Aitken J, acting under the 'full powers of supervision and revision' under the then s 53 of the courts enactment, quashed the conviction of the accused who was found guilty of an offence under s 3(a) of the Vagrants and Decrepit Enactment (Cap 191). The accused had been found on the bank of the Perak River at Kuala Kangsar 'lodging in the open air not having any ostensible means of subsistence'. The accused had hitched hike his way to Kuala Kangsar from Kuala Lumpur in search of his uncle. The accused pleaded guilty to the charge and was subsequently sentenced to ten days rigorous

imprisonment by the learned magistrate. On the matter of the sentence, Aitken J said:

> It would also seem that the learned magistrate, who tired this particular case, was under the impression that because the section provides that every person found guilty of an offence against it 'shall be liable to imprisonment for six months', therefore he was compelled to pass some sentence on such a person however many mitigating circumstances might be present. If that was his impression, then in my opinion he was under an entirely wrong impression as to the meaning of the words 'shall be liable to'. To my mind they give the court an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the accused under and in accordance with the probationary provisions of s 294 of the Criminal Procedure Code. If the legislature had intended that all persons convicted of an offence against this s 3(a) of the Vagrants and Decrepit Enactment should be sent to prison, whatever the circumstances may be, it would have used the expression 'shall be punished with imprisonment', which is to be found so frequently in our Penal Code.

[17] This approach was adopted and applied by Raja Azlan Shah J (as HRH then was) in *Public Prosecutor v Hew Yew* [1972] 1 MLJ 164; [1971] 1 MLRH 58. It was recognised in that case that the words 'shall be liable' had received several judicial pronouncements such as *Public Prosecutor v Lee Ah Sam* [1949] MLJ 236, *Khor Seek Pok v Public Prosecutor* [1958] MLJ 170, and *Darus v Public Prosecutor* [1964] MLJ 322; that these words do not mean that the provision is mandatory. In the instant case, s 15(4) of the Prevention of Crime Ordinance was under scrutiny and the provision reads as follows:

> ... shall be liable to imprisonment for a term not exceeding five years and not less than two years.

[18] His Lordship opined that:

> From that it seems to me that *the court has an absolute discretion* to impose the maximum sentence of five years or any lesser sentence the minimum of which must not be less than two years. (Emphasis added.)

[19] The above decisions were implicitly affirmed by the Federal Court in *Jayanthan v Public Prosecutor* [1973] 2 MLJ 68; [1973] 1 MLRA 586.

[20] That is the position under criminal law. A fortiori, the position would hold equally true for like provisions under civil law. It is clear that s 329(1) is couched along similar terms. Had the legislature intended that compensation be paid regardless whether damage or loss is in fact suffered, as suggested by the respondent, then the words that the appellant 'shall pay compensation to any person or body who thereby suffers any damage or loss' would have to be used. Instead, the words appearing in s 329(1) are that the appellant 'shall be liable to pay compensation'. Consequently, it would be wrong for the court to read into s 329(1) a meaning that was never intended.

[21] We are fortified in our reading of the intent of s 329(1) when we see that the term 'compensation' is used in the provision itself. *Black's Law Dictionary* (Deluxe 9th Ed) defines the term, 'compensation' as referring to 'the payment of damages, or

A any other act that a court orders to be done by a person who has caused injury to another'.

[22] Given that s 329(1) itself requires that compensation is only for damage or loss which is 'thereby' suffered, it is evident that proof of the existence of damage or loss is first of all, required. The respondent must prove on a balance of probabilities that B he has suffered a particular damage or loss 'thereby' or as a result of, the wrongful act of the appellant. How is compensation to be ordered unless there is in existence proof of the damage or loss allegedly suffered? Damage or loss is not presumed for this wrongful act; it must be established in law and on the facts. If the respondent fails to discharge that burden, the court may either refuse compensation or order nominal compensation to be paid. Until and unless the respondent has discharged C that burden, it would be an improper exercise of discretion by the court to order any compensation or assessment. Until and unless the court is so satisfied, it would be wrong for the court to direct an assessment of the amount, be it by the court itself, or as in this case, by the learned SAR. As it is, the learned High Court judge did not address this matter of compensation under s 329(1).

D [23] Consequently, the respondent's entitlement to compensation remains very much a matter of absolute discretion of the court. The order to pay compensation is not mandatory but subject to proof of the existence of damage or loss suffered. Since there was none, for this reason alone, the appeal must be allowed as the High Court had granted the order in prayer (c), seemingly as a matter of course.

E

[84] Although the above decision was reached in the context of s 327 and the order of compensation under s 329 of the National Land Code, we are of the view that the same principles should apply to the removal of caveats and order of compensation in the present appeal. There must be proof of loss. Since there F was none here, the order for compensation is plainly erroneous.

[85] The appeal is allowed on the terms above; and the counterclaim is dismissed. The decision of the High Court is set aside. The appellant is further allowed costs against both the R&M and the interveners. Deposit is refunded. G

Appeal allowed; counterclaim dismissed.

Reported by Afiq Mohamad Noor

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